No. 10,507

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WARREN H. PILLSBURY, as Deputy Commissioner for the 13th Compensation District under the Longshoremen's and Harbor Workers' Compensation Act,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a Mutual Insurance Company, and CONTRACTORS PACIFIC NAVAL AIR BASES, an Association,

Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This case arises upon a bill of complaint for judicial review of a compensation order, filed pursuant to the provisions of section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; U.S.C., Title 33, Chapt. 18, sec. 901, *et seq.*), as made applicable to persons employed at cer-

tain defense bases by the Act of August 16, 1941 (55 Stat. 622; 42 U.S.C.A., secs. 1651-1654), hereinafter called "Defense Bases Act".

Section 21(b) of the Longshoremen's Act, *supra,* provides as follows:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred * * *."

Section 3(b) of the Defense Bases Act, *supra,* provides as follows:

> "Judicial proceedings provided under sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs."

STATEMENT OF CASE.

On May 12, 1942, Charles F. Keil, Jr., at his home in Denver, Colorado, signed a contract with Contractors Pacific Naval Air Bases to work on certain de-

fense bases in the Pacific Ocean and was transported by bus by his employer to San Francisco Bay to await shipment by boat to the place of work (R. 34, 47, 48, 49, 58); upon arrival at San Francisco Bay, on the 14th of May, 1942, a more complete contract of employment was entered into (R. 38), whereby, among other things, it was agreed that the employment status should commence as of May 14th, 1942 (R. 39), and in case of injury compensation would be paid in accordance with the Defense Bases Act (R. 41); there was no boat available on the 14th of May, but it was expected one would be ready on May 21, 1942; on the latter date the boat took only three employees and the remainder, including Keil, were told to return to the hotel and wait until further notice of sailing (R. 49); in the evening of May 24, 1942, Keil and another employee *went out to supper* and on the way back to the hotel Keil was struck by an automobile, which severely injured him (R. 50, 51); Keil filed claim for compensation, and the *only issue* raised by the employer and insurance carrier at the hearing before the deputy commissioner was "whether such injury occurred in the course of and arose out of claimant's employment". (R. 46.)

Upon the evidence adduced at the hearings before him the deputy commissioner filed the compensation order of September 10, 1942, complained of, in which he found that the injury arose out of and in the course of the employment. (The compensation order containing the complete findings of fact of the deputy commissioner is printed at page 33 of the Record.)

The employer and insurance carrier then commenced a proceeding for review of the compensation order pursuant to section 21(b) of the Act (33 U.S. C.A., sec. 921(b)), alleging that the compensation order was not in accordance with law. The bill of complaint stated as the ground or reason why the compensation order was not in accordance with law that there was no substantial evidence that the injury arose out of and in the course of employment (which was the issue raised before the deputy commissioner). Libelants, however, urged *in the argument* before the court below, as an additional ground, that the deputy commissioner did not have jurisdiction to make the award (R. 24, 25), although that issue was raised neither before the deputy commissioner, nor in the bill of complaint (R. 2, 46); in fact, the complaint stated:

> "That the contract was for the performance of service at an air, military or naval base of the United States outside the Continental United States, and *the claim is within the provisions of said Military Bases Act and the jurisdiction of the appropriate Deputy Commissioner.*" (R. 5.)

The respondent deputy commissioner filed exceptions to the libel (R. 22), asking that the complaint be dismissed upon the grounds, in substance, that it appeared from the complaint and the record of proceedings before the deputy commissioner (which was made a part of the complaint), that the finding of the deputy commissioner to the effect that the injury arose out of and in the course of employment was supported by evidence, and thus supported, was final

and conclusive and that the compensation order was in accordance with law.

The case came on for hearing on January 25, 1943, on the respondent's exceptions to the libel. (The only matter before the court was the hearing on respondent's exceptions to the libel (R. 31); libelants were not in a position to make a motion for judgment on the pleadings or for summary judgment since no answer had been filed by respondent.) The court, apparently in disposition of the exceptions to the libel, granted the prayer of the libel to set aside the compensation order and entered an order to that effect on March 30, 1943 (R. 30); another order again setting aside the compensation order was entered on April 15, 1943. (R. 31.) The court subsequently made findings of fact (R. 57) in which the court found, in substance, that the compensation order was not in accordance with law because there was no evidence before the deputy commissioner that the injuries sustained by Keil arose out of and in the course of the employment, and that there was no evidence before the deputy commissioner that the injuries were sustained while Keil was upon a vessel upon the navigable waters of the United States or upon a defense base outside the continental United States. The conclusions of law of the court (R. 61) in effect repeat the finding that the injuries did not arise out of and in the course of employment, and that the deputy commissioner did not have jurisdiction.

The questions for determination of this court appear to be:

(1) Whether there was evidence before the deputy commissioner to support his finding of fact that the injuries arose out of and in the course of employment;

(2) Whether the lower court properly considered the question of jurisdiction of the deputy commissioner, that issue not having been raised before the deputy commissioner or in the complaint; and

(3) Assuming the question of jurisdiction of the deputy commissioner was properly before the reviewing court, whether that court correctly decided that the deputy commissioner did not have jurisdiction to hear the claim and make the award.

SPECIFICATION OF ERRORS.

1. The court below erred in finding that there was no evidence to support the finding of fact of the deputy commissioner that the injuries arose out of and in the course of employment.

2. The court below erred (a) in considering any question of jurisdiction, and (b) in finding and in concluding that the deputy commissioner had no jurisdiction to hear the claim and make the award.

3. The court below erred (a) in failing to give finality to the findings of fact of the deputy commissioner which were supported by evidence, (b) in reconsidering said evidence, and (c) in considering a matter of jurisdiction which was not in issue before

the deputy commissioner and which moreover had been admitted by agreement before the deputy commissioner and again admitted in the libel.

4. The court below erred in setting aside the compensation order.

5. The court below erred in denying respondent's exceptions to the libel.

SUMMARY OF ARGUMENT.

I. The deputy commissioner found that the employee's injuries arose out of and in the course of his employment; there was evidence to support this finding of fact, and it is therefore final and conclusive and not subject to judicial review.

II. The claim came within the express provisions of the Defense Bases Act.

The United States district court, therefore, erred in setting aside the compensation order upon the stated grounds that the injuries did not arise out of and in the course of employment and that the claim did not come within the provisions of the Defense Bases Act.

ARGUMENT.

I.

THE EVIDENCE SUPPORTS THE FINDING OF THE DEPUTY COMMISSIONER THAT THE INJURIES AROSE OUT OF AND IN THE COURSE OF EMPLOYMENT AND THUS SUPPORTED IS FINAL AND CONCLUSIVE.

Before proceeding to indicate the evidence which in our opinion supports the finding complained of, it may not be inappropriate to invite the court's attention to the following well established principles of compensation law.

The Longshoremen's Act should be liberally construed in favor of the injured employee or his dependent family: *Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner,* 284 U.S. 408 (1932); *Fidelity & Casualty Co. of New York v. Burris,* 61 App. D.C. 228, 59 F. (2d) 1042 (1932); *Associated General Contractors of America, Inc., et al. v. Cardillo, deputy commissioner,* 70 App. D.C. 303, 106 F. (2d) 327 (1939); *DeWald v. Baltimore & O. R. Co.,* 71 F. (2d) 810 (C.C.A. 4, 1934), cert. den. October 8, 1934, 293 U.S. 581.

In the absence of substantial evidence to the contrary the presumption is "That the claim comes within the provisions of this Act"; section 20(a) of the Longshoremen's Act.

The burden is on the plaintiff to show that there was no evidence before the deputy commissioner to support the compensation order complained of in the bill: *Grant v. Marshall, deputy commissioner,* 56 F. (2d) 654 (D.C. Wash. 1931); *United Employees*

Casualty Co. v. Summerous, 151 S.W. (2d) 247 (Tex. 1941); *Nelson v. Marshall, deputy commissioner,* 56 F. (2d) 654 (D.C. Wash. 1931); *Gulf Oil Corporation v. McManigal, deputy commissioner,* 49 F. Supp. 75 (D.C. N.D. W. Va. 1943).

The findings of fact of the deputy commissioner supported by evidence should be regarded as final and conclusive and not subject to judicial review: *South Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner,* 309 U.S. 251 (1940); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America,* 288 U.S. 162 (1933); *Crowell, deputy commissioner v. Benson,* 285 U.S. 22 (C.C.A. 5, 1932); *Jules C. L'Hote, et al. v. Crowell, deputy commissioner,* 286 U.S. 528 (1932), 71 C.J. 1297, sec. 1268; *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941).

The rights, remedies and procedure under the Longshoremen's Act are governed exclusively by the statute, and the powers properly to be exercised by the court are those only which are expressly conferred by the said Act: *Associated Indemnity Corp. v. Marshall, deputy commissioner,* 71 F. (2d) 235 (C.C.A. 9, 1934); *Shugard v. Hoage, deputy commissioner,* 67 App. D.C. 52, 89 F. (2d) 796 (1937); *Luyk v. Hertel,* 242 Mich. 445, 219 N.W. 721 (1928); *Texas Indemnity Ins. Co. v. Pemberton,* 9 S.W. (2d) 65 (Texas 1928); *Nierman v. Industrial Commission,* 329 Ill. 623, 161 N.E. 115 (1928); *Town of Albion v. Industrial Commission,* 202 Wis. 15, 231 N.W. 249 (1930). Compare also: *Bassett, deputy commissioner v. Massman Con-*

struction Company, 120 F. (2d) 230 (C.C.A. 8, 1941), cert. den. 62 S. Ct. 92.

The following is a reference to so much of the testimony taken before the deputy commissioner at the hearings before him as is considered sufficient to show that the findings of fact of the deputy commissioner are supported by evidence. This reference is not intended to cover all of the testimony as under the authorities it is necessary only to show that there is evidence to support the findings of fact of the deputy commissioner.

On May 12, 1942, Keil, who lived in Denver, Colorado, agreed to go to Hawaii to work for Contractors Pacific Naval Air Bases. A preliminary agreement was made in Denver, Colorado, and the employer furnished transportation to Keil and the other workmen to San Francisco, where the employer was to furnish further transportation by boat to Hawaii. On arrival in San Francisco on the 14th day of May, a formal contract was signed between the employer and Keil (exhibit A attached to and made part of the complaint) whereby Keil agreed to work as a steamfitter's helper on the Pacific Islands at a stated rate of pay plus board and lodging or $10.50 per week in lieu thereof, salary to commence on May 14, 1942, transportation to be furnished by the employer. Keil stayed at a hotel in Oakland, California, awaiting the boat which was expected to take them on May 21, but it took only three of the men and the remaining, including Keil, were told to go back to the hotel and await another call. Keil did as directed. On the

evening of May 24, he and another workman *went out to supper* and on the way back to the hotel Keil was hit by an automobile which severely injured him. (R. 47 to 51.)

Appellees contend that the injury did not arise out of and in the course of the employment. In the consideration of the question involving injuries which are sustained by the employee on the way to the place of employment, it might be well to review briefly that aspect of compensation law.

In the beginning, when compensation laws were first enacted, the courts strictly and literally construed the phrase "arising out of and in the course of employment" and no injury was considered compensable unless it arose during the actual working hours and while the employee was actually at work. The courts, however, were not long in recognizing that such a strict construction of the law did not tend to achieve the purpose and intent of compensation laws. Gradually the courts came to the conclusion that an employee might still be "employed" even though his physical or manual work had ceased for the time being or had not begun and that the mere fact that an injury befell the employee at a moment when he was not performing manual labor for his employer did not necessarily mean that the accident did not arise out of or in the course of the employment. In the case of *Voehl v. Indemnity Insurance Co. of North America,* 288 U.S. 162, 169, the Supreme Court said:

> "The general rule is that injury sustained by employees when going to or returning from their

regular place of work are not deemed to arise out of and in the course of their employment. Ordinarily the hazards they encounter in such journeys are not incident to the employer's business but this general rule *is subject to exceptions which depend upon the nature and circumstances of the particular employment.* 'No exact formula can be laid down which will automatically solve every case.' *Cudahy Packing Co. v. Paramore,* 263 U.S. 418, 424. See, also, *Bountiful Brick Co. v. Giles,* 276 U.S. 154, 158. While service on regular hours at a stated place generally begins at that place, there is always room for *agreement by which the service may be taken to begin earlier or elsewhere.* Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. And agreement to that effect may be either express or be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the Compensation Act." (Italics supplied.)

In the *Voehl* case, the Supreme Court specifically held that the deputy commissioner's findings of fact on the question *whether the employee's injury arose out of and in the course of his employment* should be regarded as final and conclusive where supported by evidence. There is a long line of decisions holding that under certain circumstances an injury sustained before or after working hours while the employee was going to or coming from the locus or scene of

his work may arise out of and in the course of employment. See *Swanson v. Latham,* 90 Conn. 87, 101 Atl. 492; *Larke v. Hancock Mutual Life Insurance Co.,* 90 Conn. 303, 97 Atl. 320, L.R.A. 1916 E. 584; *Cudahy Packing Co. v. Industrial Commission of Utah,* 60 Utah 161, 207 Pac. 148, 28 A.L.R. 1394; *Lumberman's Reciprocal Association v. Behnken,* 112 Texas 103, 246 S.W. 72, 28 A.L.R. 1402; *Lamm v. Silver Falls Indemnity Co.,* 286 Pac. 527 (Oregon 1930); *Littler v. Fuller Co.,* 223 N.Y. 369; *Donovan's Case,* 217 Mass. 76; *Crems v. Guest,* 1 K.B. 469 (English).

The question of entitlement to compensation for injuries sustained outside the working hours arises most frequently where the employee is being transported to and from work. What are the circumstances which would permit a finding that an injury sustained by an employee on his way to or from work arose out of and in the course of his employment? As was stated by the Supreme Court in the *Voehl* case, *supra,* "No exact formula can be laid down which will automatically solve every case." But a brief review of recent cases involving that question will indicate the circumstances and factors which the courts have considered important.

In the case of *Southern States Mfg. Co. v. Wright,* 200 So. 375 (Fla. 1941), the employee was injured while being transported in a truck of the employer to the place of employment. The injury occurred prior to working time and during a period for which the employee was not being paid. In affirming an award of compensation the court said:

"Generally it appears that the employer's liability in such cases depends upon whether or not there is a contract between the employer and employee, express or implied, covering the matter of transportation to and from work.

"* * * So, in this case where the employer required the services of the employee in its milling plant at Bonifay, and *as an incident to procuring such services there,* arranged for the transportation of the employee on the employer's truck to and from Marianna, the place where the employee lived, to and from Bonifay, there existed an implied, if not expressed, contract that the employer would provide such truck for such transportation and that the employee would use such truck for such transportation under whatever terms were agreed upon. Such transportation so had, received and used was an *incident to the employment and was exercised in the furtherance of the employment.*" (Italics supplied.)

In the case of *Taylor v. M. A. Gammino Construction Co.,* 18 Atl. (2d) 400, 127 Conn. 528 (1941), the employee worked until an early hour in the morning on an emergency job and was authorized by the boss to use a truck in which to ride home. The next day the emergency continued and the employee took the same truck home although he was not given special permission on that occasion. He was injured on the way home. The court in affirming the award of compensation, said:

"An employer may by his dealing with an employee or employees annex to the actual performance of the work, as *an incident of the employment, the going to or departure from the work;*

to do this it is not necessary that the employer should authorize the use of a particular means or method, although that element, if present, is important; it is enough if it is one which, from his knowledge of and acquiescence in it, can be held to be *reasonably within his contemplation as an incident to the employment,* particularly where it is of benefit to him in furthering that employment." (Italics supplied.)

In the case of *Crysler v. Blue Arrow Transportation Lines,* 295 Mich. 606, 295 N.W. 331 (1940), the employee was engaged in driving a truck between Grand Rapids and Chicago. At Chicago the truck was unloaded, reloaded and driven back to Grand Rapids. Whenever the truck arrived at Chicago too late on Saturday to be reloaded, the employee had the choice of staying at Chicago until Monday or of going back to Grand Rapids on another truck of the company. On the occasion in question the employee arrived at Chicago on Saturday and rode another truck back to Grand Rapids. On Sunday he boarded a truck in Grand Rapids to return to Chicago and was injured en route. The question was whether his injury was sustained in the course of his employment. The court, affirming an award to the employee, stated:

"Solution of the problem in the present case is aided by the test suggested in the Knopka case, 'whether under the contract of employment, *construed in the light of all the attendant circumstances,* there is either an express or implied undertaking by the employer to provide the transportation.'

"In the case before us there was a clear undertaking on the part of the employer to furnish

> weekend transportation between Grand Rapids and Chicago whenever the last trip of the week did not leave the driver in his home town." (Italics supplied.)

In the case of *Rubeo v. Arthur McMullen Co.,* 193 Atl. 797 (N.J. 1937), the employee was hired as a skilled concrete worker to do some work on a dock which the employer was building on Staten Island, New York, some distance from his home. The evidence was in conflict as to whether the employee was to be provided with transportation from his home to the site of the work, but it was clearly shown that the superintendent regularly transported the employee to the job and back in one of the company trucks. The injury occurred on the homeward trip. In affirming an award of compensation the court said:

> "When the accident happened, the essential statutory relation, in popular understanding and intent, had not been terminated. The line of delineation is not so finely drawn. The provision of transportation, if not the subject of an express or implied undertaking binding under any and all circumstances, *was plainly within the contemplation of the parties,* at the time of the making of the contract of employment, as the thing to be done when in special circumstances the common interest would therefore be subserved. But however this may be, the furnishing of this accommodation grew, with the knowledge and acquiescence, if not indeed the direction of the employer, into a practice *grounded in mutual convenience and advantage.* The deceased employee, while not directly concerned, in the journeys to and fro, with the performance of the work for

which he was employed, was yet engaged in that which, by mutual consent was considered as incidental to the employment. It was a thing so intimately related to the particular service contracted for as to be deemed, in common parlance, a part of it. This is the legislative sense of the term 'employment.' *The requisite relation of master and servant continued during the journey; and the hazards thereof are therefore regarded as reasonably incident to the service bargained for.*" (Italics supplied.)

In the case of *Lamm v. Silver Falls Timber Co.*, 286 Pac. 527 (Oregon 1930), an employee of the lumber company was injured while returning to camp from town where he had gone over the weekend. In deciding that the employee's injury came within the provisions of the workmen's compensation law the court said:

> "*From the foregoing, the conclusion seems justifiable that the plaintiff would not have been injured but for his employment. It is true that when he was injured he was not working for the defendant, but he was in its employ.* His work did not begin until the following morning; but his employment began when the defendant accepted the plaintiff into its employ some months previously.
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> * * * * * * *
>
> "We come now to the more specific question whether the injury arose out of and in the course of the employment. This court, as well as other courts, has many times pointed out that the problem, whether an injury arises out of and in the course of the employment, is not to be determined by the precepts of the common law governing

the relationship between master and servant; these ancient rules include the principles defining negligence, as assumption of risk, fellow-servant doctrine, contributory negligence, etc. Likewise, all courts are agreed that there should be accorded to the Workmen's Compensation Act a broad and liberal construction, that doubtful cases should be resolved in favor of compensation, and that the humane purposes which these facts seek to serve leave no room for narrow technical constructions. * * *

"One of the purposes of the Workmen's Compensation Acts is to broaden the right of employees to compensation for injuries due to their employment. Since these acts contemplate compensation for an injury arising out of circumstances which would not afford the employee a cause of action, the right to redress is not tested by determining whether a right of action could be maintained against the employer. Stark v. State Industrial Accident Commission, 103 Or. 80, 204 P. 151. The word employment, as used in such legislation, is construed in its popular signification. We quote from the decision of the Montana Court in Wirta v. North Butte Mining Co., 64 Mont. 279, 210 P. 332, 335, 30 A.L.R. 964; 'The word "employment" as used in the Workmen's Compensation Act, does not have reference alone to actual manual or physical labor, *but to the whole period of time or sphere of activities, regardless of whether the employee is actually engaged in doing the thing he was employed to do.* * * * To say that plaintiff "ceased" working for the defendant is not equivalent to saying that he severed the relation of employer and employee.'

"Since the courts have recognized the broad humane purposes of the act, they have readily perceived that the mere fact that the injury befell the claimant, at a moment when he was not performing manual labor for his employer, does not necessarily prove that the accident did not arise out of or in the course of the employment. The words just mentioned which are a part of most of the acts are never qualified by the limitation that the injury must have been inflicted during regular working hours.

* * * * * * *

"Since employment is construed in its popular signification, an employee is frequently granted compensation from the fund, even though his hours of service have not yet begun, or have ended, and even though he is not upon the premises of his employer engaged in physical service of the latter.

* * * * * * *

"A careful study of the foregoing cases, as well as the ones to which reference will later be made, seems to warrant the conclusion that the courts deem that the theory of Workmen's Compensation Acts is to grant compensation to an injured workman on account of his *status*. He is an integral part of the industry, and the latter should bear the costs of his recovery like it bears the costs incurred by the replacement of mechanical parts. *When the status of an employee, that is his relationship to the industry, brings him within the zone where its hazards cause an injury to befall him, he is entitled to compensation.* The courts which allowed the above recoveries, and other courts to whose decisions we shall later advert, evidently did not confine their searches to the doubtful words 'accident arising out of

> and in the course of his employment,' but bore in mind this general purpose of the act, as revealed by its entire text." (Italics supplied.)

In the case of *Ohmen v. Adams Bros.,* 109 Conn. 378, 146 Atl. 825, the court aptly indicated the conditions under which an employee is covered under the compensation law as follows:

> "We have held that an injury to an employee is said to arise in the course of his employment at a place where he may reasonably be, and while he is fulfilling the duties of his employment, or engaged in doing something incidental to it, or something which he is permitted by the employer to do for their mutual convenience. * * *
>
> "We have also held: 'An injury arises out of an employment when it occurs in the course of the employment and is the result of a risk involved in the employment or incident to it, or to the conditions under which it is required to be performed. The injury is thus a natural or necessary consequence or incident of the employment or of the conditions under which it is carried on.' "

Is it necessary that the employee be in or on a vehicle, as appellees intimated in the court below (R. 19), in order that liability for compensation shall attach to an injury sustained other than during actual working hours or at a place other than the ordinary place of work? To so contend is to fail to comprehend the basis upon which these cases rest. It is that the *employment status* is considered to extend beyond the customary working hours or beyond the em-

ployer's premises because the agreement or contract of employment, express or implied, contemplates that the employee shall do the thing or be at the place, resulting in injury. (See the recent case of *Ward v. Cardillo, deputy commissioner,* 135 F. (2d) 260 (App. D.C. 1943), where it was urged, as in the instant case, that the employment had not begun because the transportation had not begun.) There are a number of occasions when injuries, incurred away from the employer's premises and outside the regular working hours, are nevertheless considered as arising out of and in the course of employment even though the employee is not riding in or on a vehicle. For example, an employee may be within the coverage of the compensation law on his way to or from the place of work if the contract of employment provides or contemplates that he be paid for the time consumed in going to or from the place of work. See *Traynor v. City of Buffalo,* 208 App. Div. (N.Y.) 216; *Orange Screen Co. v. Drake,* 151 Atl. (N.J.) 486; *Fenton v. Industrial Accident Commission of California,* 112 Pac. (2d) 763; *Cymbor v. Binder Coal Co.,* 285 Pa. 440, 132 A. 363; *Ohmen v. Adams Bros.,* 146 Atl. 825, 109 Conn. 378 (1929). It is the extension of the *employment status* to the time and place of the injury which is the basis of the liability for payment of compensation, not the fact that the employee is in a vehicle. If the employment brings the employee to the place where he encounters a risk peculiar to that place, an injury resulting from that risk is compensable.

Street risks to which the employee is exposed by reason of his employment are hazards of the employment. *Katz v. Kadans,* 232 N.Y. 420. See also, *Proctor v. Hoage, deputy commissioner,* 65 App. D.C. 153, 81 F. (2d) 555, which was a case arising under the Longshoremen's Act (the basic Act involved in the instant case), as made applicable to the District of Columbia. In the latter case the employee was injured by an automobile while crossing a street on his way home. He was an insurance agent and had just left his superior officer who ordered him to go home and complete certain reports and have them ready for the morning. The court said that the employee "was acting under and by command of his employer in the discharge of his duties as employee and that while going home intending to perform the work which had been directed by his superior officer to perform at that place he was engaged in the discharge of his duties as an employee of the company." In the case of *Sheehan v. Board of Trustees,* 281 N.Y. 613, the court stated: "The test seems to be whether at time of the accident his work compelled him to travel there."

Where an employee is sent by his employer upon a long trip in connection with the employment the risks incidental to his itinerary are special in character. See recent case of *Lepow v. Lepow Knitting Mills, Inc.,* 288 N.Y. 377, decided by the New York Court of Appeals on July 29, 1942. There the court said:

> "In *Matter of Marka v. Gray* (251 N.Y. 90), where this court considered the question * * *

> whether the risks of travel are also risks of the employment, it was said, per Chief Judge Cardozo (p. 93), '* * * the decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils.' "

In the instant case the employee was on a special mission for his employer; he was on his way to Hawaii to assist in the construction of a defense base which his employer had contracted to construct; he and the employer specifically agreed that his employment status should begin as of May 14, 1942, and continue while he was waiting for the boat on which he was to complete the journey which had begun in Denver, Colorado; it was certainly contemplated that the employee would not remain confined to his hotel or hotel room while waiting for the boat but would go out for such things as meals, fresh air, and necessary recreation, etc.; the journey from Denver, Colorado, to Hawaii should be considered as a single undertaking and an injury sustained in the course thereof as one arising out of and in the course of the employment since the risk was reasonably within contemplation of the parties. A voyager making a trip of thousands of miles encounters many hazards in addition to those encountered on the boat, train, bus or other conveyance, which are hazards of the voyage and would not be encountered if the employee had remained at home; hazards are encountered in port upon completion of one leg of the journey and while waiting to resume another. It would be a narrow construction of the compensation law to say that

such risks and hazards were not within the contemplation of the parties at the time the contract of employment was entered into, especially where the contract specifically provides that the employment status shall begin prior to and continue during the journey. Coverage of an employee under the compensation law should not take on the characteristics of a kaleidescope wherein he is protected under the law against injury one minute and unprotected the next. An employee who has been ordered to proceed to a distant country and who in the course of the journey, while awaiting transportation at a port of embarkation is injured in a street accident by an automobile while returning to the hotel seems clearly to have been in an employment status and to have been injured as the result of a risk created by the employment. Why should not the industry in which the employee was employed bear the burden of the injury to one of its employees who was *where he was, at the time he was* because of his journey on behalf of the employer? It is no answer to say that at the time, the employee was performing a personal act,—that he would have had to eat whether he was in Oakland or Denver. The fact is, that were it not for the journey to Hawaii undertaken at the direction of his employer he would not have encountered the particular traffic hazard or risk which caused his injury. It was the employment which brought him to that place and exposed him to that risk. *Katz v. Kadans, supra; Roberts v. Newcomb & Co.,* 201 App. Div. 759, affirmed 234 N.Y. 553. Compare also, the recent case of *Aguilar v. Standard Oil Co. of New Jersey,* 318 U.S. 724 (1943),

where it was said: "The voyage creates not only the need for relaxation ashore but the necessity that it be satisfied in distant and unfamiliar ports."

Commonalty doctrine obsolete.

In the court below libelants advanced the archaic "commonalty doctrine" as a reason why the employee should not receive compensation for his injuries. (R. 19.) In the early administration of compensation laws some of the states adopted what was then referred to as the "commonalty doctrine". Under such doctrine it was deemed necessary to show that the employee was subject to a greater risk or hazard than that to which the public in general was subjected. This doctrine led to so many injustices that it has been repudiated wherever critical judicial inquiry into all of its aspects has been made. Such doctrine has *not* been adopted in decisions arising under the Longshoremen's Act. The doctrine was specifically rejected by the United States Circuit Court of Appeals for the fourth circuit in the leading case of *Baltimore and Ohio R.R. Co. v. Clarke, deputy commissioner,* 59 F. (2d) 595. In that case the court said:

> "And we think it equally clear that heat prostration resulting from the conditions of employment, as was found by the deputy commissioner in this case, is compensable under the statute without reference to whether there was any unusual or extraordinary condition in the employment not naturally and ordinarily incident thereto. The statute provides that 'the term "injury" means accidental injury or death arising out of

> and in the course of employmnt.' 33 USCA Sec. 902. *It says nothing about unusual or extraordinary conditions; and there is no reasonable basis for reading such words into the statute.* A workman who sustains heat prostration as the result of the working conditions under which he labors, has sustained an injury 'arising out of and in the course of his employment'; and the fact that other workmen may not have been affected or that he may have been rendered more readily susceptible to injury than they were by reason of his physical condition cannot affect the matter." (Italics supplied.)

Such doctrine was also specifically rejected by the United States Court of Appeals for the District of Columbia in *New Amsterdam Casualty Co. v. Hoage, deputy commissioner,* 62 F. (2d) 468, which arose under the Longshoremen's Act as applied in the District of Columbia. The court in that case said that:

> "In the early administration of compensation laws, the rule was often adopted that injuries occurring upon the public highways due to traffic hazards did not 'arise out of' the workmen's employment. This rule was founded upon the theory that such hazards are common to the community at large and are not incident to particular employments, and it was held that the compensation acts were not designed to exempt the employee from such risk. *This doctrine, however, has since been abandoned."* (Italics supplied.)

In the case of *Aetna Life Insurance Co. v. Hoage, deputy commissioner,* 63 F. (2d) 818, the appellant attempted to invoke the old "Commonalty Doctrine"

in heat stroke cases, arguing that the employee in that case was not subject to any greater heat than was common to the community in general. In the *Aetna Life Insurance Company* case the court definitely reaffirmed the position previously taken in the *New Amsterdam Casualty Company* case, *supra,* by holding that:

> "Although the risk may be common to all who are exposed to the sun's rays on a hot day, the question is whether the employment exposes the employee to the risk."

The leading case in New York which destroys the effect of the obsolete "Commonalty Doctrine" is the *Matter of Katz v. Kadans & Co.,* 232 N.Y. 420, 134 N.E. 330, wherein the court said that:

> "But the fact that the risk is one to which every one on the street is exposed, does not itself defeat compensation. Members of the public may face the same risk every day. *The question is whether the employment exposed the workman to the risks by sending him onto the street, common though such risks were to all on the street."* (Italics supplied.)

One of the cases upon which appellees relied and upon the basis of which the lower court was urged to set aside the compensation order in this case is that of *Mobile and Ohio R.R. Co. v. Industrial Commission,* 28 F. (2d) 228, which was decided in 1928. In that case the employee was killed as the result of a tornado which blew down the shop in which he was working and many other buildings in the same community. Applying the "commonalty doctrine" the

court stated that the employee was exposed to no more risk than the general public. Besides applying a doctrine now outmoded, the factual situation in that case differs from that of the instant case. There the employee was injured as the result of a so-called "Act of God"; in the instant case the employee was injured as the result of a traffic accident which is a recognized man-made risk to which every traveler is exposed and since he became a traveler because of his employment, his employment exposed him to the risk. A reading of the opinion in the *Mobile* case, *supra,* shows that it is replete with illogic and with exaggerated examples and illustrations which have largely disappeared from modern decisions.

The Longshoremen's Act is recognized as one of the most liberal of any workmen's compensation law in the United States. It was modeled after the New York workmen's compensation law, which is also recognized as one of the most advanced of compensation laws. *Bethlehem Shipbuilding Corp., Ltd. v. Monahan, deputy commissioner,* 54 F. (2d) 349 (C.C.A. 1, 1931); *Luckenbach Steamship Co., Inc. v. Marshall, deputy commissioner,* 49 F. (2d) 625 (D.C. Oregon 1931); *Mahoney v. Marshall, deputy commissioner,* 46 F. (2d) 539 (D.C. W.D. Wash. N.D. 1931); *Hartford Accident & Indemnity Co. v. Hoage, deputy commissioner,* 85 F. (2d) 411.

Injuries sustained during "waiting time" are compensable.

It is well established that injuries sustained by an employee while waiting to begin work arise out of and in the course of employment. *West Penn Sand &*

Gravel Co. v. Norton, deputy commissioner, 95 F. (2d) 498 (C.C.A. 3, 1938) (a case also arising under the Longshoremen's Act); *Bull Insular Line, Inc., et al. v. Schwartz, deputy commissioner,* 23 F. Supp. 359 (D.C. N.Y. 1938) (another case under the Longshoremen's Act); *Norris v. New York Central Railroad Co.,* 246 N.Y. 307, 158 N.E. 879 (1927); *Snear v. Eiserloh,* 144 So. 265 (La. App. 1932); *Dzikowska v. Superior Steel Co.,* 103 Atl. 351, 259 Pa. 578; *Wisconsin Mutual Liability Co. v. Industrial Commission of Wisconsin,* 232 N.W. 885, 202 Wisc. 428; *North Carolina R. Co. v. Zachary,* 232 U.S. 248.

This is also true where the "waiting time" involves an interval of "waiting" and eating. In the case of *Cardillo, deputy commissioner v. Hartford Accident and Indemnity Co.,* 109 F. (2d) 674 (App. D.C. 1940), cert. den. 309 U.S. 689 (also under the Longshoremen's Act), the employee had been requested by his employer to drive from Washington, D.C. to Mt. Vernon, Virginia and there to pick up certain passengers who were sightseeing at the National Shrine. While he was waiting for his passengers to make the tour of Mt. Vernon the employee went on a side journey of a few miles to obtain lunch and while he was returning from that journey he sustained an injury. The court said that the *securing of lunch* during the trip was necessary and served the purpose of the employer as well as of the employee.

In the following cases similar waiting and refreshment intervals were held to come within the ambit of the employment. *T. J. Moss Tie Co. v. Tanner,* 44 F.

(2d) 928 (C.C.A. 5, 1930) (a case under the Longshoremen's Act), and *Ballard v. Engel,* 4 N.Y.S. (2d) 363, aff'd in 278 N.Y. 463 (1938). In the latter case the lower court said:

> "It would be taking too technical a view of the law to say that a pause in the actual course of his work by an employee for the purpose of eating is a break in his employment from the time he stops work to the time when he begins again. We must take a broader view and treat the employee as continuing in his employment."

In the same case the Court of Appeals said:

> "We think the evidence warranted the finding that the employment was not interrupted while deceased was *returning from supper* on the occasion in question." (Italics supplied.)

In the case of *In re: Sundine,* 105 N.E. 433, 218 Mass. 1, the court held that an injury sustained by an employee while returning from lunch arose out of and in the course of her employment because "it was an incident of her employment to go out for this purpose".

In the case of *H. W. Nelson R. Const. Co. v. Ind. Comm. of Ill.,* 122 N.E. 113, 286 Ill. 632, the court said:

> "The general rule announced in both English and American decisions is that going to lunch by an employee is an incident of his employment; that the dinner hour although not paid for by the employer is included in the time of employment; that a temporary absence from the place of employment for the purpose of procuring food does

> not suspend the employment; that an injury occurring during such a temporary absence arises out of and in the course of such employment."

From the above cases it would seem that during waiting periods or intervals between actual work, the employment does not terminate; the employee continues to be such.

It may be urged by appellees that because the facts are undisputed, the fact question as to whether the injury arose out of and in the course of employment becomes one of law, subject to reconsideration and revaluation. The courts have on several occasions stated that fact questions determined by the deputy commissioner do not become questions of law because the basic facts are undisputed. *Puget Sound Freight Lines, et al. v. Marshall, deputy commissioner,* 125 F. (2d) 876 (C.C.A. 9, 1942); *South Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner,* 309 U.S. 251 (1940); compare: *Gray v. Powell,* 314 U.S. 402 (1941), and *United States v. Morgan,* 313 U.S. 409 (1941). In the case of *Puget Sound Freight Lines, supra,* this Honorable Court stated:

> "Because there is no conflict in the evidence, appellants seek to have the claimant's status settled as a matter of law. In the case of South Chicago Co. v. Bassett, 309 U.S. 251, 258, 60 S.Ct. 544, 548, 84 L. Ed. 732, it was urged that 'the question whether the decedent was a member of a "crew" was a question of law,' because the facts were undisputed. But the Supreme Court disagreed with that contention saying that the 'word "crew" does not have an absolutely unvarying

legal significance'. The court there held that the deputy commissioner's determination of the employee's status was conclusive and not subject to judicial review if supported by substantial evidence. See also the opinion of the Circuit Court of Appeals for the Seventh Circuit rendered in the same case, and reported in 104 F. 2d at page 522. We are consequently limited to an inquiry into the existence of any evidence to support the deputy commissioner's finding that Jondro was not a crew-member."

II.

THE QUESTION OF JURISDICTION OF THE DEPUTY COMMISSIONER TO HEAR THE CASE AND MAKE THE AWARD WAS NOT BEFORE THE COURT BELOW, BUT ASSUMING THAT IT WAS, IT WAS ERRONEOUSLY DECIDED.

The employer and carrier did not raise the issue before the deputy commissioner that the Longshoremen's Act, as extended by the Defense Bases Act, was not applicable to the injuries sustained by Keil; in fact it was stipulated before the deputy commissioner that "the only issue is whether such injury occurred in the course of and arose out of claimant's employment". (R. 46.) Issues raised in proceedings for judicial review under section 21(b) of the Longshoremen's Act must have been first raised before the deputy commissioner, and where the record does not show that such issues were first raised before the deputy commissioner they will be considered as having been waived and will not be heard by the court upon judicial review: *Maryland Casualty Company v. Cardillo,*

deputy commissioner, and Mary Najjum, 107 F. (2d) 959 (App. D.C. 1939); *Southern Shipping Co. v. Lawson, deputy commissioner,* 5 F. Supp. 321 (D.C. Fla. 1933); *Metropolitan Casualty Insurance Co. v. Hoage, deputy commissioner,* 67 App. D.C. 54, 89 F. (2d) 798 (1937); *Liberty Stevedoring Co., Inc. v. Cardillo, deputy commissioner,* 18 F. Supp. 729 (D.C. N.Y. 1937); *Grain Handling Co., Inc. v. McManigal, deputy commissioner,* 23 F. Supp. 748 (D.C. N.Y. 1938); *State Treasurer v. West Side Trucking Co.,* 198 App. Div. 432, affirmed 233 N.Y. 202, 135 N.E. 544; *Burmester v. De Lucia,* 263 N.Y. 315, 189 N.E. 231 (1934); *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941). Moreover, libelants alleged in their complaint (R. 6), that the only issue was whether the injury occurred in the course of and arose out of claimant's employment, and voluntarily alleged (R. 5, 45) that the contract of employment was for the performance of services at a defense base and that the claim was within the provisions of the Defense Bases Act.

The courts have held that the parties cannot object to the jurisdiction of a tribunal hearing the compensation case for the first time upon a review of the case. *Chicago Packing Co. v. Industrial Board of Illinois,* 282 Ill. 497, 118 N.E. 727 (1918); *Klettke v. C. & J. Commercial Driveway, Inc.,* 250 Mich. 454, 231 N.W. 132 (1930); *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Grasselli Chem. Co. v. Simon,* 84 Ind. App. 327, 150 N.E. 617 (1926); *Walker v. Speeder Mach. Co.,* 213 Iowa 1134, 240

N.W. 725 (1932); *McCombs Coal Co. v. Alford,* 234 Ky. 42, 27 S.W. (2d) 430 (1930); *Gillard's Case,* 244 Mass. 47, 138 N.E. 384 (1923); *Mark v. Keller,* 188 Minn. 1, 246 N.W. 472 (1933); *Timmerman v. State Ind. Comm.,* 305 Ill. 485, 137 N.E. 440 (1922); *Paradise Coal Co. v. Industrial Comm.,* 301 Ill. 504, 134 N.E. 167 (1922); *Pocahontas Mining Co. v. Industrial Comm.,* 301 Ill. 462, 134 N.E. 160 (1922); *American Milling Co. v. Industrial Comm. of Illinois,* 279 Ill. 560, 117 N.E. 147 (1917).

In the *Chicago Packing* case, *supra,* the court said:

> "One of the contentions raised by plaintiff in error is that deceased was not engaged in an extra-hazardous occupation. Before the arbitrator counsel for both sides agreed that both plaintiff in error and deceased were working under the Workmen's Compensation Act and that the only question in dispute was whether the accident arose out of and during the course of employment. The question now sought to be raised was not urged before the industrial board on review or before the circuit court. By entering into this agreement and not thereafter raising the question either before the arbitrator or the industrial board on review, the plaintiff in error waived the right to raise any question of jurisdiction. American Milling Co. v. Industrial Board, 279 Ill. 560, 117 N.E. 147."

In *Klettke v. C. & J. Commercial Driveway, Inc., supra,* the court said:

> "Defendant, however, contends that the Department of Labor and Industry had no jurisdic-

> tion because the accident happened in interstate commerce. This point was not raised in defendant's answer. Before the commission, the parties stipulated that the employer and employee were subject to the act. It is too late to raise the question for the first time in this court."

The court below made a finding of fact that there was no evidence before the deputy commissioner that the injuries were sustained "while said Charles F. Keil, Jr. was employed as a worker (other than a member of the crew) on a vessel lying in or plying the navigable waters of the United States (including any dry dock), nor while said respondent was employed at any military, air or naval base acquired by the United States from a foreign country or on land occupied or used by the United States for military or naval purposes outside the continental limits of the United States." (R. 60.) The court also made a conclusion of law that the deputy commissioner "acted entirely without and beyond his jurisdiction". (R. 61.)

It is submitted that appellees' objections to the jurisdiction of the deputy commissioner came too late and should be considered to have been waived or improperly raised. Moreover, the objections were *not* raised in the pleading but only in a *memorandum* submitted to the court below. The libel or complaint *admitted* agreement with respect to the deputy commissioner's jurisdiction (R. 5), and libelants' memorandum was not only at variance with the complaint, but at variance with the agreements and understandings before the deputy commissioner.

Assuming, however, that the issue whether the claim came within the provisions of the so-called Defense Bases Act (42 U.S.C. secs. 1651-1654), was before the lower court, it was decided erroneously.

When the United States acquired certain lands from Great Britain for defense purposes, and it was decided to turn these and other lands in the Territories into defense bases, Congress realized the necessity of adequate and uniform compensation protection for the employees who should be engaged in the construction of the bases. Instead of going to the trouble and delay of formulating a new compensation law in all of the required details, it adopted and made applicable the compensation features and other main provisions of the Longshoremen's and Harbor Workers' Compensation Act which had been in successful operation for over fourteen years. The section of the Defense Bases Act making applicable the Longshoremen's Act provides as follows:

> "That except as herein modified, the provisions of the Act entitled 'Longshoremen's and Harbor Workers' Compensation Act', approved March 4, 1927 (44 Stat. 1424), as amended, and as the same may be amended hereafter, shall apply in respect to the injury or death of any employee engaged in any employment at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government or any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone,

irrespective of the place where the injury or death occurs.'' (Italics supplied.)

To say, as appellees do (R. 25), that the Defense Bases Act applies only to injuries which occur upon navigable waters of the United States because the Longshoremen's Act applies only to injuries which occur upon navigable waters of the United States is to disregard the entire purpose of the so-called Defense Bases Act (and the language therein), which was to provide compensation protection for employees who were to be engaged almost entirely in the construction of *land bases;* it is also to disregard the plain wording of the statute that the Act is applicable "irrespective of the place where the injury or death occurs." Statutes should be construed in the light of their purpose and in the light of reason.

Likewise, to say (R. 25) that the so-called Defense Bases Act does not apply because the injuries were not sustained at a defense base outside the continental limits of the United States is again to disregard the express provision of the Act that it applies to injuries sustained "irrespective of the place where the injury or death occurs." This honorable court has already held, in *Liberty Mutual Insurance Company v. Gray, deputy commissioner,* decided August 27, 1943, ... Fed. (2d) ....., that the Defense Bases Act is applicable to injuries sustained by an employee who is injured away from the place of employment.

Local compensation laws inapplicable.

Appellees also contended (R. 25) that inasmuch as Keil resided at an hotel in California awaiting transportation en route from his home in Denver, Colorado (and appellees intimated before the District Court (R. 25)—though there appears to be no evidence to support it—that the employers Contractors Pacific Naval Air Bases (which was an association of contractors) was a resident of California), the workmen's compensation law of California applies, to the exclusion of the Defense Bases Act. When Congress acts within a sphere where it has jurisdiction to act, it is presumed that it intended to exercise to the fullest extent all the power and jurisdiction it had on the subject matter. (*Continental Casualty Company v. Lawson, deputy commissioner,* 64 F. (2d) 802 (C.C.A. 5, 1933.) It can not be doubted that Congress had power to construct defense bases upon lands obtained by treaty from Great Britain, or upon the territorial lands of the United States used for defense purposes. The employment of men and the care of them and their families in case of injury is a necessary incident of the exercise of that authority and power.

The language of section 1 of the Defense Bases Act is substantially the same as section 1 of the Act of May 17, 1928 (45 Stat. 600), making the Longshoremen's Act applicable, by extension thereof, to the District of Columbia. The latter Act provides in part that the Longshoremen's Act "shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of

Columbia, irrespective of the place where the injury or death occurs." Argument such as appellees made below was urged in connection with previous cases relating to the extension of the Longshoremen's Act to the District of Columbia; namely, that the extension was applicable only in the District of Columbia. This argument, however, has never been sustained, and many cases of employees carrying on employment in the District of Columbia, but who sustained injury outside of such District have been held to be within the purview of the Longshoremen's Act as extended to the District of Columbia. Where employment is carried on in the District of Columbia, the District of Columbia Workmen's Compensation Act applies, notwithstanding the injury is sustained while the employee is working outside the District. See *Moyer v. Cardillo, deputy commissioner,* 115 F. (2d) 785 (App. D.C. 1941). By analogy, therefore, the Defense Bases Act applies where there is employment, as in the present case, in connection with any military, air or naval base, "irrespective of the place where the injury or death occurs."

In a recent case involving the question of jurisdiction, *Davis v. Department of Labor and Industries of Washington,* 317 U.S. 249 (1942), the Supreme Court said:

> "Faced with this factual problem we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. Where there

has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There we are aided by the provision of the federal act, 33 U.S.C. sec. 920, 33 U.S.C.A. sec. 920, which provides that in proceedings under that act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary.' Fact findings of the agency, where supported by the evidence, are made final. *Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error.* It was under these circumstances that we sustained the Commissioner's findings in Parker v. Motor Boat Sales, supra." (Italics supplied.)

See also, *Gray v. Powell,* 314 U.S. 402 (1941).

CONCLUSION.

In view of the above, it is respectfully submitted that the findings of fact of the deputy commissioner to the effect that claimant's injuries, which were sustained en route to his place of employment, arose out of and in the course of his employment, is supported by evidence; that the claim came within the provisions of the so-called Defense Bases Act; that the compensation order complained of is in accordance with law; and that compensation should be paid to the employee for his injuries, as the employer agreed to do in the contract of employment. (R. 41, par. 12.)

The orders and decrees of the United States District Court, setting aside the compensation order, should be reversed and the libel directed to be dismissed.

Dated, San Francisco,
October 29, 1943.

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